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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 29.

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, *Petitioner*

v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A Corporation of the STATE OF VIRGINIA.

BRIEF FOR PETITIONER.

ALVIN L. NEWMYER
DAVID G. BRESS
SHELDON E. BERNSTEIN
1001 15th Street, N. W.
Counsel for Petitioner

Of Counsel

NEWMYER & BRESS
1001 15th Street, N. W.
Washington, D. C.

MORRIS GEWIRZ,
Investment Building
Washington, D. C.

THEODORE SHERBOW
522 Equitable Building
Baltimore, Md.

September, 1948

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Cases

CONSTITUTION AND STATUTES

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OPINIONS BELOW.

The majority (R. 10-18) and dissenting (R. 18-22) opinions of the circuit court of appeals are reported at 165 F. 2d 531. No opinion was filed by the district court.

JURISDICTION

The judgment of the circuit court of appeals was entered December 31, 1947 (R. 22). The petition for a writ of certiorari was filed March 3, 1948, and granted March 29, 1948 (R. 23). The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Congress could, under either Article I, Section 8 or Article III, Section 2 of the Constitution, vest district courts generally with original jurisdiction of suits of a civil nature between citizens of the several states proper and citizens of the District of Columbia, and whether the Act of April 20, 1940, so amending Section 24 (1) (b) of the Judicial Code is constitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Section 24 (1) (b) of the Judicial Code (28 U.S.C. § 41 (1) (b), 1946 ed.), as amended by the Act of April 20, 1940 (c. 117, 54 Stat. 143), provides in pertinent part:

> "The District Courts shall have original jurisdiction as follows:
>
> * * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * is between citizens of different States, *or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory,* * * * [1]

[1] The italicized portions were added by the amending statute of April 20, 1940. The Judicial Code as recodified, effective September 1, 1948, now provides as follows:

> § 1332. Diversity of citizenship; amount in controversy
>
> (a) The district courts shall have original jurisdiction of of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> (1) Citizens of different States;
>
> (2) Citizens of a State, and foreign states or citizens or subjects thereof;
>
> (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

The Constitution of the United States in pertinent part provides:

Article I, Section 8

"The Congress shall have power . . .

"[Cl. 17.] To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be . . .

[Cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."

Article III, Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, Section 2:

"The judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting

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[1] (continued.)

(b) The word "States," as used in this section, includes the Territories and the District of Columbia."

However, the foregoing altgration would not appear materially to affect resoiuton of the issues presented in this cause since the effect of the new language is merely to clarify the 1940 amendment.

Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT.

Petitioner, a corporation of the District of Columbia (R. 1, 6), and respondent, a corporation of the State of Virginia (R. 1, 6), entered into a contract of insurance on September 30, 1942 (R. 1). Thereafter, on August 12, 1947, petitioner, the insurer, filed a civil suit against respondent in the District Court for the District of Maryland to secure reimbursement under the contract in the sum of $10,000 on account of payments petitioner was required to make because of respondent's breach of the insurance contract (R. 1-5).

In its complaint, petitioner asserted that the district court had jurisdiction of the cause under Section 24 (1) of the Judicial Code (R. 1). On respondent's motion (R. 5), the district court dismissed the complaint on September 18, 1947, stating that the Act of April 20, 1940, "is unconstitutional to the extent that it amended Section 41 (1) (b) of Title 28 U.S.C.A.[2] by extending the jurisdiction by the Federal Courts beyond controversies between citizens of different states" (R. 6). Thus the district court held that Congress could not constitutionally empower it to entertain suits between citizens of the District of Columbia and citizens of the several states proper.

On appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of the district court was affirmed,

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[2] Section 24 (1) (b) of the old Judicial Code, Section 1332 of the new Judicial Code, effective September 1, 1948. See fn. 1, *supra*.

Senior Circuit Judge Parker dissenting.[3] The majority of the court below held (R. 10-18): (1) that since the District of Columbia is not a "state" proper within the meaning of that term as used in Article III, Section 2 of the Constitution, Congress lacked authority under that article—pursuant to which it presumably acted in adopting the 1940 amendment—to vest the district courts with original jurisdiction of suits between citizens of the District and of the states, and (2) that even if Congress were presumed to have acted under the plenary and far reaching power granted by Article I, Section 8 (Cl. 17 and 18), the 1940 amendment was unconstitutional because the congressional power over the District is territorially limited to the District and Congress cannot "extend beyond the constitutional limits the jurisdiction of United States District Courts under the guise of exercising its legislative prerogative that is limited to the District of Columbia" (R. 17).

Judge Parker, the Senior Circuit Judge, dissenting, (R. 18-22) was of the view: (1) that the complete legislative authority of Congress to create courts was not expressed in Article III and that such power, insofar as the District of Columbia was concerned, was granted by Article I, Section 8 (Cl. 17 and 18), and (2) that the authority conferred

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[3] The 1940 Act was also held unconstitutional in *Central States Cooperatives, Inc.* v. *Watson Bros. Transportation Company*, 165 F. 2d 392 (C. C. A. 7) now pending before this court on a petition for a writ of certiorari (No. 43, O. T. 1948); *Wallis* v. *Dennis*, 72 F. Supp. 853 (W. D. Va.); *Feely* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md.); *Wilson* v. *Guggenheim*, 70 F. Supp. 417 (E. D. S. C.); *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593 (D. Mass.); *Behlert* v. *James Foundation of New York*, 60 F. Supp. 706 (S. D. N. Y.) and *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa.).

A contrary conclusion was reached in *Duze* v. *Wooley*, 72 F. Supp. 422 (D. Hawaii); *Glaeser* v. *Acacia Mutual Life Assoc.*, 55 F. Supp. 925 (N. D. Cal.); *Winkler* v. *Daniels*, 43 F. Supp. 265 (E. D. Va.) and by the district court (N. D. Ill.) in the *Central States* case; *supra*.

An appeal involving the same question has not yet been decided by the Third Circuit: *Van Sant* v. *American Express Co.* No. 9044.

upon Congress by Article I, Section 8 (Cl. 17 and 18) empowered it either to create courts to sit in or outside of the territorial limits of the District of Columbia to hear causes involving District citizens, or, as it did by the Act of April 20, 1940, to combine such jurisdiction with that of the ordinary federal courts already created under Article III.

SPECIFICATIONS OF ERRORS TO BE URGED.

The circuit court of appeals erred:

1. In affirming the judgment of the District Court.

2. In holding that the Act of April 20, 1940, was unconstitutional insofar as it amended Section 24 (1) (b) of the Judicial Code to give the federal district courts original jurisdiction of suits between citizens of the District of Columbia and citizens of the states proper.

SUMMARY OF ARGUMENT.

I.

The 1940 amendment of the Judicial Code giving federal district courts generally original jurisdiction of suits between citizens of the District of Columbia and citizens of the states proper is within the authority conferred by the diversity clause of Article III, Section 2 of the Constitution. When the Constitution was adopted, the citizens of what is now the District of Columbia were citizens of the states proper (Maryland and Virginia) and were, therefore, entitled to the assurances of the diversity clause as legislatively implemented. The purpose of the diversity clause was to eliminate possible prejudice against nonresidents in foreign courts by offering them recourse to impartial federal forums. Its language evidences an intention to cover all cases where the parties are residents of different political communities; there is nothing in the constitutional background to support a more limited intent or coverage. Accordingly, since citizens of the District of

Columbia, would be equally affected with citizens of the States proper and with aliens by the evil against which this provision was directed, the District of Columbia must be treated as a "state" for the purposes of the diversity clause.

Hepburn v. *Ellzey*, 2 Cranch 445, merely held that the First Judiciary Act of 1789, conferring upon the circuit courts jurisdiction of cases between citizens of different states, did not authorize jurisdiction of suits between citizens of the District of Columbia and citizens of the states proper. The decision did not construe either Article I or Article III of the Constitution which are here involved. That and others of Chief Justice Marshall's decisions suggest that the limitation found to exist in the First Judiciary Act could be cured by further legislation. Furthermore, the factors which may have led to Chief Justice Marshall's construction of the First Judiciary Act do not support a similar current construction of the diversity clause of Article III of the Constitution, because today the District of Columbia has the vital characteristics of a state proper and it has been held to be a "state" in analagous cases.

Accordingly, the 1940 amendment extending the diversity jurisdiction of federal district courts to suits between citizens of the District and of the states proper does not go beyond the limitations of Article III and, to the extent that *Hepburn* v. *Ellzey* infers the contrary, that decision is in error.

II.

The extension of diversity jurisdiction to citizens of the District is also constitutionally appropriate under Article I, Section 8, (Cl. 17 and 18) giving Congress plenary and far reaching authority to legislate for the District and its citizens and, as a facet of such authority, to create such judicial forums as shall be necessary and proper.

The legislative power over the affairs of the District granted by Article I, Section 8 is not so limited, expressly or impliedly, as to be operative only within the territorial boundaries of the District; the power can be exercised as a national power throughout the United States. Accordingly, Congress could, thereunder, create courts to sit in or outside the District to hear the causes of its citizens.

The federal judicial power conferred by Article III is supplemented by the power to vest judicial authority implicit in Article I, Section 8 (Cl. 17 and 18). Moreover, decisions of this court show that so-called constitutional courts created under Article III can have non-Article III judicial functions conferred upon them. Therefore, it was entirely proper for Congress to merge in the federal district courts generally the jurisdiction conferred under Article III with jurisdiction conferred as an exercise of the legislative authority under Article I, Section 8, as was accomplished by the 1940 Amendment of the Judicial Code.

ARGUMENT.

Introduction.

One hundred and fourty-four years ago, Chief Justice Marshall held that the First Judiciary Act[1] had not given the federal courts (circuit courts) generally jurisdiction of suits between citizens of the District of Columbia and of the states proper and that although this was "extraordinary" it was a subject "for *legislative*, not for judicial consideration". *Hepburn* v. *Ellzey*, 2 Cranch 445, 453 (1804). (Italics supplied.) By the Act of April 20, 1940, Congress corrected this previous legislative omission and gave citizens of the District equal access to the federal courts with citizens of the states proper and aliens. Now some courts, including that below, have held that the discrimination noted by Marshall could not be legislatively removed because of the absence of constitutional authority.

Accordingly, we have to determine whether the Act of April 20, 1940, is proscribed by the Constitution, and for this purpose petitioner assumes that no inquiry is required as to whether federal diversity jurisdiction is desirable, necessary or practical. While there have been spirited attacks upon the wisdom of the creation of such diversity jurisdiction,[6] there are at least equally tenable arguments in its behalf.[7] In any event, as Chief Justice Marshall stated in the *Ellzey* case, *supra*, the matter is one for legislative and not judicial consideration, and would now appear settled by reason of the action of the Seventy-Sixth Congress in affirming and enlarging such federal jurisdiction.

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[5] This question and the several cases decided since the enactment of the 1940 Amendment have been the subject of extensive and varied law periodical comment. See e. g. *Dykes* and *Keeffe*. *The 1940 Amendment to the Diversity of Citizenship Clause* (1946), 21 Tulane L. Rev. 171; Weston, *District of Columbia Citizens Denied Diversity Jurisdiction* (1948), 16 Geo. Wash. L. Rev. 381; Walker, *Citizens of the District of Columbia and the Federal Diversity Jurisdiction* (1948) 15 J. B. A. Dist. Col. 55. See also notes in 29 Geo. L. J. 193 (1940); 5 La. L. Rev. 478 (1943); 11 Geo. Wash. L. Rev. 258 (1943); 21 Tex. L. Rev. 83 (1942); 55 Yale L. J. 600 (1946); 46 Col. L. Rev. 125 (1946); 61 Harv. L. Rev. 885 (1948); 34 Va. L. Rev. 91 (1948); 22 Notre Dame L. Rev. 232 (1947); 36 Geo. L. J. 251 (1948); 96 U. of Pa. L. Rev. 440 (1948); 46 Mich. Rev. 557. (1948).

[6] See e. g. Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928), 13 Corn. L. Q. 499, 520 *et seq.*; Friendly, *Historic Basis of Diversity Jurisdiction* (1928), 41 Harv. L. Rev. 483.

[7] See e. g. Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States* (1933), 19 A. B. A. J. 71, 149, 265; Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship* (1929), 78 U. of Pa. L. Rev. 179; Weston, *op. cit. supra* fn. 5.

I.

FEDERAL JURISDICTION OF SUITS BETWEEN CITIZENS OF THE DISTRICT AND OF THE STATES PROPER IS AUTHORIZED BY THE DIVERSITY CLAUSE OF ARTICLE III, SECTION 2.

A. The Citizens of the District are Constitutionally entitled to the Benefits of Diversity Jurisdiction Because They Were Citizens of States When the Constitution Was Adopted.

It would seem pertinent to evaluate the terms of Article III, Section 2 in the light of the political pattern at the date of the adoption of the Constitution. The then Union was made up exclusively of thirteen states and the citizens of what later became the District of Columbia were citizens of two of them, Maryland and Virginia, and thus entitled to the advantages and benefits intended by the diversity clause of Article III, Section 2 as legislatively implemented. The same was true in 1789 when the First Judiciary Act was passed conferring upon the circuit courts jurisdiction of the type contemplated by the diversity clause. See fn. 20 *infra*. Accordingly, unless some specific and compelling constitutional direction required it, the constitutional assurances of the diversity clause should not be taken from the citizens of that area. As this Court said in *Downes* v. *Bidwell*, 182 U. S. 244, 260-261, discussing its previous decision in the *Loughborough* case, *infra*, p. 19:

> "There could be no doubt as to the correctness of this conclusion [that a direct federal tax could be made operative within the District], so far, at least, as it applied to the District of Columbia. This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution

could not be dissolved, without at least the consent of the Federal and State Governments to a formal separation. *The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution.* Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal Government". (Brackets and italics supplied.)

And to the same effect is the decision in *O'Donoghue v. United States*, 289 U. S. 516, 540 where this Court said:

"It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. 3. We think it is not reasonable to assume that the cession stripped them of these rights and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union."

B. The District Is a State Within the Meaning of Article III, Section 2.

1. The purpose of the diversity clause embraces the District.

"Probably nothing in the whole debates [of the Constitutional convention] is more astonishing than the slight discussion reported by Madison as given to the Judiciary Article of the Report of the Committee of Detail of August 6, [1787]."[8] Little or no contemporaneous discussion of the scope or application of that article has been reported. One of the few statements of the purpose of the diversity clause was that of Hamilton to the effect that:

> "The reasonableness of the agency of the National Court in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his cause, or in any cause in respect to which he had the least interest or bias. This principle had no inconsiderable weight in designated the Federal Courts as the proper tribunals for the determination of controversies between different States and their citizens."[9]

That the diversity clause was intended to offer to all non-residents of a particular state full opportunity for the settlement of disputes removed from local prejudice and influence is confirmed by the remarks by Chief Justice Marshall in *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 87, in which the Court held that the jurisdiction granted by the diversty clause was available to corporate as well as to individual parties because:

> "However true the fact may be, that the tribunals of the states will administer justice as impartially as

[8] Warren, *The Making of the Constitution*, (1928), p. 531. See also Farrand, *Framing of the Constitution* (1913), p. 154. For a detailed history of the adoption of the diversity clause see Friendly *op. cit. supra* fn. 6.

[9] *The Federalist* (No. 88). To same effect see report of Madison's remarks in the Virginia ratification convention. 2 Elliot, *Debates* (1828), p. 391.

those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right; and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals."[10]

No more informative explanation of the scope of the diversity clause has been found in the statements of the founders or in contemporaneous reports. However, it is apparent that the objective and policy of that clause, as described by Hamilton and Marshall, are as apposite to suits between citizens of the District of Columbia and of the states proper as to suits between citizens of different states proper. There is no reason to suppose that a citizen of the District of Columbia would be less apprehensive in the local courts of Mississippi than would a citizen of New York. The objective of the constitutional provision was to lessen the impact upon *all* litigating on their adver-

[10] Cf. the remarks of Johnson, J., in *Polk* v. *Wendell*, 5 Wheat. 292, 301 to the effect that the "sole object" of diversity jurisdiction "is to secure to *all* the administration of justice, upon the same principles on which it is administered between citizens of the same state." (Italics supplied.)

saries' home grounds by offering a federal system of umpires removed so far as possible from potentially partial local influences." The broad reach of the diversity clause is apparent from the inclusion of aliens, thereby reflecting an intention to comprehend all cases involving the citizens of more than a single political community. See *Polk* v. *Wendell*, *supra*, fn. 10. Therefore, in the absence of affirmative evidence of a more restrictive constitutional intention, the diversity clause ought—in keeping with its objective—to be applied as Congress has seen fit to apply it in the 1940 Amendment, so as to offer its protection to citizens of the District as well as those of the states proper. This Court has said that "* * * the practical construction of the Constitution by Congress * * * is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the Convention which framed, and of the Conventions which ratified the Constitution." *Veazie Bank* v. *Fenno*, 8 Wall 533, 544.

The construction of Article III, Section 2 adopted by Congress in enacting the 1940 Amendment cannot be discarded except on the theory that the District of Columbia is excepted from the reach of the diversity clause by reason of its not having been specifically mentioned therein. But the propriety of such an arbitrary application of the maxim *expressio unius est exclusio alterius* would appear negated by the clear intent of the framers to include all categories of non-residents. Indeed, it is difficult to believe that had the specific problem here raised been presented to the framers they would have provided otherwise, since they expressly opened the federal judicial forum even to aliens,[12] and, as this Court held by judicial construction in the *Deveaux* case, *supra*, they did the same for corporate bodies. Certainly the opportunity of an im-

[12] Diversity jurisdiction "is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias". Frankfurter, *op. cit. supra*, fn. 6, 21 Cornell L. Q. at 520.

[13] *Sere* v. *Pitot*, 6 Cranch 332.

partial federal justice offered indiscriminately to citizens in general, to aliens and to corporate bodies was not intended to be withheld from citizens who happened to reside at the seat of government.

2. The 1940 Amendment expressly providing that diversity jurisdiction shall be available to citizens of the District of Columbia was first suggested by Hepburn v. Ellzey.

The diversity problem as applied to citizens of the District of Columbia was first considered by this Court in *Hepburn v. Ellzey*, 2 Cranch 445. The Court there held that the jurisdiction conferred upon the circuit courts by the First Judiciary Act of suits between "a citizen of the state where the suit is brought, and a citizen of another state" did not comprehend suits between citizens of the District and of the states proper.[13] 2 Cranch at 452. However, that decision was merely one of statutory construction and did not, as sometimes suggested,[14] announce a rule of constitutional law. It decided no more than that the First Judiciary Act of 1789 did not grant such jurisdiction.[15] This is apparent from Chief Justice Marshall's approach in the *Deveaux* case, *supra*. There he concluded that a corporation was in the class to which the diversity clause of the Constitution applied. While the Chief Jus-

[13] In *New Orleans v. Winters*, 1 Wheat. 91, the question arose in regard to the territory of Louisiana which was held to be in the same category as the District of Columbia.

[14] See e. g. *Hooe v. Jamieson*, 166 U. S. 395, 396-397; *O'Donoghue v. United States*, 289 U. S. 516, 543.

[15] See Dykes and Keeffe, *op. cit. supra* fn. 5, 21 Tulane L. J. at 176-177. Traditionally, constitutional language is given a broader or more flexible meaning than the same language in legislation, because "the Constitution has a broader purpose than a statute and is intended to last for a much longer time, [and accordingly] its wording should possess a flexibility which is not needed in a statute." Chafee, *Federal Interpleader Since the Act of 1936* (1940), 49 Yale L. J. 377, 395. See also *Lamar v. United States*, 240 U. S. 60, 65.

tice conceded that a corporation "is not a citizen",[16] he nevertheless felt that the purpose and spirit of the diversity of citizenship clause was dispositive. A contrary conclusion would have been required had Marshall chosen to govern his decision by the maxim *expressio unius est exclusio alterius*. Thus it seems clear that had he intended in *Ellzey* to do more than construe the First Judiciary Act and to enunciate constitutional doctrine, he would have concluded, as in *Deveaux*, that technical rules of construction aside, the objectives and purposes of the diversity clause were as applicable to citizens of the District of Columbia as they were to corporate bodies (see discussion *supra*, pp. 13-14) and that there was nothing in the historical constitutional materials to compel their exclusion from the benefits of that provision.

That the *Ellzey* decision was confined to the construction of the First Judiciary Act is also demonstrated by the fact that Congress was actually there invited to take remedial action in the following words (2 Cranch at p. 453):

> "It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for *legislative*, not for judicial consideration." (Italics supplied.)

The 1940 amendment is the belated acceptance of that invitation.[17]

Even assuming that Chief Justice Marshall intended to reflect upon the lack of constitutional authority to extend diversity jurisdiction to suits between citizens of the District and of the state proper, there is basis for current re-

[16] 2 Cranch at 86-87.

[17] H. Rep. No. 1756, 76th Cong., 2d Sess. quoted *infra* p. 21.

examination of this conclusion.[15] As one writer has pointed out in some detail,[16] when *Ellzey* was decided, and previously when the First Judiciary Act was enacted, the national capital was just coming into being and had not yet acquired any definitive political pattern.[17] In 1801 it was a small community of about 5,000, including slaves, foreigners and transients and was governed under temporary legislation. Thus when Marshall was called upon to determine whether the District was to be treated as a "state" for diversity purposes, it was a small relatively unimportant political subdivision without, as yet, any permanent status or government. In contrast, the District today is one of the larger metropolitan communities of

[15] The *Ellzey* decision has generally been followed without examination of the reasons behind it. See e. g. *Hooe* v. *Jamieson*, 166 U. S. 395; *Cameron* v. *Hodges*, 127 U. S. 322; *Barney* v. *Baltimore*, 6 Wall. 280.

[16] Weston, *op. cit. supra* fn. 5, 16 Geo. Wash. L. Rev. at 286-387.

[17] When the Constitution was signed (September 17, 1787) and became effective by ratification of the ninth state (June 21, 1788) no plans had yet been carried out for the establishment of a seat of government as provided in Article I, Section 8 (Clause 17). Nor had this been accomplished when the first Congress met (April 30, 1789) and passed the First Judiciary Act of September 24, 1789. The cessions by Maryland (Acts of December 23, 1788, and December 19, 1791) and Virginia (Act of December 3, 1789), accepted by Congress in 1790 (Act of July 16, 1790; 1 Stat. 130, c. 28), did not vest jurisdiction of the new seat of government in the United States until December 1800.

Provision for the government of this area was not made until February 27, 1801 (2 Stat. 103, c. 15), and even that provision was limited to the creation of local courts and related matters. The laws of the ceding states remained operative in the District except as changed by federal statute. *Russell* v. *Allen*, 107 U. S. 163; *Rhodes* v. *Bell*, 2 How. 397, 404; *Tayloe* v. *Thomson*, 5 Pet. 358, 368. The local government was expanded and reorganized in a successive series of Congressional enactments beginning in 1812 and culminating in the present Organic Act of June 11, 1878 (fn. 22, *infra*).

See D. C. Code (1940) p. XXVIII *et seq.* for text of various statutes referred to in this footnote.

the United States,[21] operating under an extensive and permanent system of government,[22] and ranking in community, commercial and physical stature with the states proper if not so outranking many of them.[23] Consequently, while in 1804 there may have been practical basis for a contrary conclusion, the size and significance of the District in the commercial and economic life of the nation in the year 1948 now requires its being treated as a state for purposes of the problem at hand.[24] Apart from the effect the then characteristics of the District may have had upon the decision in the *Ellzey* case, it has also been suggested that the contemporaneous power struggle between the Federalists and the followers of Jefferson and the resultant opposition to the federal courts may have influenced Marshall's cautiously restrictive approach in that case.[25]

With these considerations in mind, it would not be without precedent for this Court to determine that the changed economic and political scene requires a different approach to and conclusion for the problem. Cf. *Erie R. R. v. Tompkins*, 304 U. S. 64, reversing the ninety-five year rule as to whether the federal courts must follow state decisions on matters of general law; and *The Genesee Chief v. Fitzhugh*, 12 How. 443, where this Court refused to allow the definition of the term "admiralty jurisdiction" in effect at the time of the adoption of the Constitution because the Court was convinced that the scope and usage

[21] The U. S. Department of Commerce, *Sixteenth Census of the United States, 1940, Population*, Vol. II (3) pp. 555, 566, shows that the District had a population of 633,091 in 1940, the year in which the statute here in question was enacted.

[22] See present Organic Act of the District of Columbia entitled AN ACT PROVIDING A PERMANENT FORM OF GOVERNMENT FOR THE DISTRICT OF COLUMBIA, (Act of June 11, 1878; 20 Stat. 102; D. C. Code [1940] p. LVIII).

[23] Even as early as 1882 some courts realized that the changed status of the District called for a broader application of the word "state" as employed in the diversity clause. See *Watson v. Brooks*, 13 Fed. 540, 543-544 (C. C. D. Oregon).

[24] Weston, *op. cit. supra* fn. 5, 16 Geo. Wash. L. Rev. at 387-388.

of the term had changed with the intervening years to include rivers and lakes as well as merely tidal waters, which could not have been foreseen by the constitutional framers.

3. Treating the District as a State for diversity purposes is suggested by analogous decisions of this Court.

Other decisions of this Court demonstrate that, in determining whether the word "state" is to be applied to the District of Columbia, the term is to be read in the context of, and to effectuate, its specific constitutional purpose. Thus in *Loughborough* v. *Blake*, 5 Wheat. 317, the Court upheld universal direct federal taxation, made statutorily applicable to the District, on the grounds that the taxing power was a general one extending throughout the United States without limitation as to place, and that the provision of Article I, Section 2 ("* * * direct taxes shall be apportioned among the several states * * * according to their respective numbers") merely furnished a standard for apportionment. Similarly, in *De Geofroy* v. *Riggs*, 133 U. S. 258, the District of Columbia was held to be one of "the states of the Union" within the meaning of that term as used in a consular convention with France which assured certain rights to French citizens in the states of the Union. In answer to the contention that the assurances of the Convention were not operative within the District of Columbia, this Court stated that "No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the states it would hardly refuse to them in the District embracing its Capitol * * *". 133 U. S. at 271. The District has also been treated as a state by this Court in other similar contexts.[20]

[20] See e. g. *Stoutenburgh* v. *Hennick*, 129 U. S. 141 (commerce clause); *Embry* v. *Palmer*, 107 U. S. 3 (full faith and credit).

For collection of various cases involving question whether the District is a "state" see 29 Georgetown L. J. 193 (1940).

As in the *Loughborough* case, it might be said here that the diversity clause merely furnished a standard and set a policy for legislative action and that the word "state" was there used merely in a general descriptive or geographic sense for specific legislative definition as required by the times. And, as in *De Geofroy*, no plausible motive can be assigned for the discrimination that would be effected by the contrary construction by the lower court.

Accordingly, it is submitted that the District of Columbia is a state within the meaning of Article III, Section 2 and should have been so considered under the First Judiciary Act of 1789 without the necessity of resorting to the 1940 Amendment, *Hepburn* v. *Ellzey* notwithstanding. If *Hepburn* v. *Ellzey* is not overruled, the 1940 Amendment should be held to be a valid exercise of legislative power by Congress contemplated both by the Constitution and by the express language of *Hepburn* v. *Ellzey*.

II.

ARTICLE I, SECTION 8 OF THE CONSTITUTION AUTHORIZES THE GRANT OF FEDERAL JUDICIAL JURISDICTION OVER SUITS BETWEEN CITIZENS OF THE DISTRICT AND OF THE STATES PROPER.

A. Congress Has Plenary Authority to Legislate for the Benefit of the District and Its Citizens.

The courts have repeatedly held—as is implicit in the power to make "all laws which shall be necessary and proper" [28]—that the power of the United States in respect of the government and administration of the District of Columbia is plenary and far-reaching, and that it can be exercised as Congress sees fit, subject only to express constitutional limitation. *O'Donoghue* v. *U. S.*, 289 U. S. 516. Chief Justice Marshall recognized the broad reach of that power in holding that it was to be exercised as a national

[28] Article 1, Section 8, Cl. 18, *supra*, p. 3.

power throughout the Union rather than merely as a local function. *Cohens* v. *Virginia*, 6 Wheat. 264, 424-429. See also *Embry* v. *Palmer*, 107 U. S. 3; *Neild* v. *District of Columbia*, 110 F. 2d 246, 250-251 (App. D. C.).

This power has never known curtailment. It, of course, includes the power to provide forums for the settlement of disputes involving District citizens; and the courts established by Congress in and for the District under this power are national courts or so-called "constitutional courts" created under Article III and having the same general characteristics and jurisdiction as the general federal courts created under that Article. *O'Donoghue* v. *United States*, *supra*.

In short, the 1940 amendment of the Judicial Code was a legitimate exercise of the plenary power of Congress with respect to the District of Columbia if that law was "necessary and proper." That it was, has already been decisively determined by Congress. In its report accompanying the bill which became the amending act of 1940, the Judiciary Committee of the House of Representatives, after stating the purpose of the bill and reciting at some length the reasons and authority from which it concluded that "there appears to be no constitutional objection to this bill", stated:

> "It is submitted that H. R. 8822 is a reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories. It should be borne in mind that the citizens of the District of Columbia and of the Territories are citizens of the United States. They are subject to the burdens and obligations of such citizenship just as are the citizens of the 48 States. Simple justice requires that they should share the rights and privileges of such citizenship insofar as Congress has authority to confer upon them. This is the real intent of the Constitution. [27]

[27] H. Rep. 1775, 76th Cong., 2nd Sess., accompanying H. R. 8822.

If any doubts remain, the soundness of this recent legislative finding of necessity would appear confirmed by Chief Justice Marshall's comment that the previous discrimination against citizens of the District was "extraordinary", as well as by the expressed purpose of the constitutional framers in creating diversity jurisdiction in the first instance. Assuming, as we must, in view of the constitutional determination, that diversity jurisdiction is necessary and proper, it is equally necessary and proper for citizens of the District for, as already shown, such citizens are subject to the same apprehensions as are citizens of the states, and it was because of that identical kind of apprehension that diversity jurisdiction was conceived. See dissent below R. 19, fn.*.

Accordingly, there remains only the question whether there is any affirmative constitutional limitation upon the exercise of the power under Article 1, Section 8 (cl. 17 and 18) in the form articulated in the 1940 Amendment.

B. The Federal Government's Power Over the District is Not Limited Territorially to the District.

It was suggested by the majority below (R. 15) that the power of the federal government under Article I, Section 8 is limited territorially to the District. But Clause 17 contains neither an express nor implied limitation to that effect, and such a limitation would appear negated by the authority conferred upon Congress under Clause 18, "to make all laws which shall be necessary and proper" to carry out its duties under Clause 17. It would appear sufficient under these provisions that Congress determine, as it did here, that it is necessary and proper for the proper government of the District and for the welfare of its citizens to make a particular law operative beyond the borders of the District. Moreover, the determination by this Court that Congressional authority over the affairs of the District is national in character and can be exercised throughout the United States (see discussion *supra* pp. 20-21) is

clearly inconsistent with any such territorial limitation of power.

The only discernible basis for this limiting contention of the majority below is by analogizing the status of the District to that of a state proper, i.e, since state government is operative only within the state's territorial borders, the federal legislative authority over the District of Columbia is similarly limited. The rationale would have to be that federal authority exercised for the District is no greater than that of a state proper. However, if for purposes of Article I, Section 8 (Cl. 17 and 18), the constitutional draftsmen intended the District to be accorded the status of a state, then there is reason to attribute to them a similar intention with respect to Article III, Section 2. If no such intent can be attributed with respect to Article III, then no such intent should be imputed to limit the authority conferred by Article I (Cl. 17 and 18).

C. The Power Granted in Article I, Section 8 Supplements and is Not Limited by Article III, Section 2.

It has also been argued, in derogation of the constitutionality of the 1940 Act as an exercise of the plenary authority over the District, that the power conferred by Article I, Section 8 "is conditioned by and to be interpreted in the light of" the limitations of Article III, Section 2, and that the latter article fixes the jurisdictional limits of federal judicial authority. (See majority opinion below at R. 17). However, it can as readily be said that Article III is "conditioned by, and to be interpreted in the light of" Article I, Section 8.

Article III "does not express the full authority of Congress to create courts". *Ex parte Bakelite Corp.*, 279 U. S. 438, 449. Nor does it reflect the full panorama of federal judicial jurisdiction. *Williams* v. *United States*, 289 U. S. 553. The authority to create courts in and for the District of Columbia, under the power conferred by Article I, Section 8, is one facet of that extra-Article III authority. And

the *O'Donoghue* case, *supra*, held that a so-called constitutional court created under Article III can be vested with jurisdiction beyond that specified by that Article. While the *O'Donoghue* case, on its facts, merely approved a merger in the courts of the District of Columbia of judicial functions incident to the exercise of Article I powers with those prescribed in Article III, there is no reason why a similar merger cannot be effected in the other federal courts for the benefit of the citizenry of the District of Columbia who have the same need for federal diversity jurisdiction and for whom Congress sits as a legislature. The rule against vesting legislative or administrative functions in constitutional courts[28] certainly has no vitality with respect to a merger of strictly judicial functions. Indeed there is considerable authority in historic practice and decision for such a merger. In *Williams* v. *United States*, 289 U. S. 553, involving the question whether the Court of Claims was an Article III court for purposes of legislation affecting the salaries of its judges, this Court held that the Court of Claims exercised judicial power within the framework of the Constitution in deciding cases involving claims against the government, and further stated (289 U. S. at 565-566):

> "* * * the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained or concurrent jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power and defined by Art. 3 of the Constitution."

[28] See *Williams* v. *United States*, 289 U. S. 553, 565-567.

> "That judicial power apart from that article may be conferred by Congress upon legislative courts, as well as upon constitutional courts, is plainly apparent from the opinion of Chief Justice Marshall in American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 546, dealing with the territorial courts: 'The jurisdiction,' he said, 'with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.' That is to say, (1) that the courts of the territories (and of course, other legislative courts) are invested with judicial power, but (2) that this power is not conferred by the third article of the Constitution, but by Congress in the execution of other provisions of that instrument. The validity of this view is borne out by the fact that the appellate jurisdiction of this court over judgments and decrees of the legislative courts has been upheld and freely exercised under acts of Congress from a very early period, a practice which can be sustained, as already suggested, only upon the theory that the legislative courts possess and exercise judicial power—as distinguished from legislative, executive or administrative power—although not conferred in virtue of the third article of the Constitution. 'The authority to naturalize aliens has been vested in the courts from the beginning of the government; and it cannot be doubted that in discharging this function the courts exercise judicial power.'"

Thus the *Williams* case, approving review of Court of Claims decisions by the Supreme Court,[29] also demonstrates that the federal constitutional courts generally can legislatively be given judicial power beyond that specified in Artice III, Section 2. It is important to note the favorable reference there made by this Court to the fact that the federal district courts have been given concurrent jurisdiction under the Tucker Act[30] with the Court of Claims of

[29] See § 1255, new Judicial Code (1948).

[30] 43 Stat. 972, 28 U. S. C. 41 (20).

these extra-Article III cases, when the amount in controversy is less than $10,000. A similar grant of jurisdiction to the federal district courts to hear war risk insurance cases also received the judicial blessing. *United States* v. *Hossman*, 84 F. 2d 808 (C. C. A. 8). Note also the scope of the jurisdiction conferred upon district courts by the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843; 28 U. S. C. § 921 *et seq.*).

That Article III Courts can be vested with non-Article III judicial jurisdiction is also established by the practice with respect to appeals from the territorial courts. Several of the circuit courts of appeal are vested with such appellate jurisdiction which is not limited to Article III Section 2, cases.[31] Moreover, this court made it clear in *Amado* v. *United States*, 195 U. S. 472 and *Laurel Oil & Gas Co.* v. *Morrison*, 212 U. S. 291 [32] that the jurisdiction of the several courts of appeal over cases coming from the territorial courts was dependent solely on statute and not necessarily limited to federal questions or to diversity cases within the classifications of Article III, Section 2, but based on the fact that such territorial courts exercise judicial power.

It must be recognized, therefore, that Article III must be read together with all other sources of authority in the Constitution and that the courts created thereunder are empowered to consider not only judicial matters of the

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[31] Under the new Judicial Code, the appropriate circuit courts of appeal (§ 1294) have general and unlimited jurisdiction of "all final decisions" (§ 1291) and various interlocutory decisions (§ 1292) of the District Courts of Alaska, the Canal Zone and the Virgin Islands. Jurisdiction of appeals from final decisions of the Supreme Courts of Puerto Rico and Hawaii is granted with respect to cases arising under the Constitution and laws of the United States and "all habeas corpus proceedings, and in all other civil cases when the value in controversy exceeds $5,000, exclusive of interest and costs" (§ 1293). Compare Section 128 of the old Judicial Code.

[32] See also *Ex parte Wilder's S. S. Co.*, 183 U. S. 545; *De Castro* v. *Board of Commissioners*, 221 U. S. 451; *Successor to Fantazzi* v. *Municipal Assembly of Arecibo, Puerto Rico*, 295 Fed. 803 (C. C. A. 1), certiorari granted 265 U. S. 577, certiorari quashed 268 U. S. 699.

types there enumerated, but also such other judicial matters as may, under the other provisions of the Constitution, be within the power of the Congress to confer upon them by legislation. The merger of such judicial functions in these courts makes them no less constitutional courts. Accordingly, Article III does not preclude Congress from granting to federal courts generally judicial functions, based upon the exercise by Congress of its legislative duties, under Article I, Section 8 (Cl. 17 and 18) for the government and welfare of the District of Columbia and its citizens.

CONCLUSION.

The Act of April 20, 1940 amending the Judicial Code is the long overdue and constitutionally motivated relief for the citizens of the District of Columbia from the discrimination practised by a too rigid application of the First Judiciary Act. The Act of April 20, 1940 accords the District the status of a state for purposes of the diversity clause of Article III, Section 2 of the Constitution in order that its citizens might be afforded equal access to federal courts generally with all other citizens of the United States, with aliens and with corporate bodies. Thus conceived, the statute comes within the spirit of if not the letter of the judiciary article of the Constitution and, in any event, within the legislative power to be exercised for the

welfare of the District. Accordingly, the Act should be deemed constitutional and the judgment below reversed.

Respectfully submitted,

ALVIN L. NEWMYER,
DAVID G. BRESS,
SHELDON E. BERNSTEIN,
Counsel for Petitioner,
1001 15th Street, N. W.
Washington, D. C.

Of Counsel:
NEWMYER & BRESS
1001 15th Street, N. W.
Washington, D. C.

MORRIS GEWIRZ
Investment Building
Washington, D. C.

THEODORE SHEEBOW
522 Equitable Building
Baltimore, Md.

September, 1948.